(18) (17)

Nos. 83-1065 and 83-1240

In the Supreme Court of the United States

OCTOBER TERM, 1984

COUNTY OF ONEIDA, NEW YORK, ET AL., PETITIONERS

v.

ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

STATE OF NEW YORK, PETITIONER

v.

ONEIDA INDIAN NATION OF NEW YORK STATE, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the respondent groups of Oneida Indians have a cause of action under federal law to recover damages for the use and occupation of land that was part of the Oneida Indian Nation's aboriginal homeland, protected by federal treaties, and purchased from the Oneida Nation by the State of New York in 1795 in a transaction that was invalid under federal law because it was not approved by the United States.

2. Whether the Indians' suit must be dismissed because it presents non-justiciable political questions.

3. Whether the Indians' suit is time-barred because (a) a state statute of limitations that would bar the suit should be incorporated into federal law, or (b) the cause of action abated upon the expiration of the Trade and Intercourse Act of 1793 or its successors enacted in 1796 and 1799.

4. Whether New York's unauthorized acquisition of the land in 1795 subsequently was ratified by federally approved treaties in 1798 and 1802.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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This Brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

HISTORICAL BACKGROUND

1. The aboriginal home of the Oneida Nation was a 6 million-acre strip of land approximately 50 miles wide running in a north-south direction through east-central New York (Pet. App. 19a, 29a).[1] During the Revolution, the Oneida and Tuscarora Nations sided with the Colo-

[1] "Pet. App." and "Supp. Pet. App." refer to the Appendix and Supplemental Appendix to the Petition for a Writ of Certiorari filed by the Counties of Oneida and Madison, New York, in No. 83-1065.

nists, and the other four of the Six Nations in New York sided with the British (Supp. Pet. App. 9a). After the War, the United States entered into the Treaty of Fort Stanwix of October 22, 1784 with the Six Nations (7 Stat. 15 *et seq.*), in which it gave peace to the four Nations that had sided with the British and provided that the loyal Oneida and Tuscarora Nations "shall be secured in the possession of the lands on which they are settled." Arts. I, II, 7 Stat. 15.

Soon after the Treaty of Fort Stanwix, the State of New York, without the approval of the federal government, obtained cessions of the Oneidas' land in 1785 and 1788. In the 1788 Treaty, the Oneidas "[did] cede and grant all their lands"—in excess of 5 million acres—"to the people of the State of New York forever," but "reserved" for themselves, also "forever," a tract of approximately 300,000 acres near Oneida Lake. Supp. Pet. App. 10a. After the 1788 transaction, the United States and the Six Nations entered into the Treaty of Fort Harmar of January 9, 1789 (7 Stat. 33 *et seq.*),[2] under which "[t]he Oneida and Tuscarora nations, are also again secured and affirmed in the possession of their respective lands." Art. 2, 7 Stat. 34.

2. In 1790, Congress enacted the first of the Trade and Intercourse Acts that long have embodied the essential features of federal Indian policy. 1 Stat. 137 *et seq.* Section 4 of that Act provided that "no sale of lands made by any Indians * * * shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138.

[2] In *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 121-122 n.18 (1960), this Court referred to the Treaty of Fort Harmar as "unratified." However, it appears that the Senate did not deem it necessary to give its advice and consent to that Treaty because negotiation of the Treaty had been authorized by the Continental Congress prior to the effective date of the Constitution. See 1 *American State Papers* (*Indian Affairs*) 88-89 (1832). The Treaty of Fort Harmar is printed in the Statutes at Large and, in our view, should be regarded as fully effective.

Section 8 of the Trade and Intercourse Act of 1793 carried forward the substance of Section 4 of the 1790 Act by providing that "no purchase or grant of lands, or of any title or claim thereto," from an Indian nation "shall be of any validity in law or equity" unless "made by a treaty or convention entered into pursuant to the constitution." 1 Stat. 330. Congress in 1793 also for the first time made it a criminal offense for any person not employed under the authority of the United States even to treat with the Indians "for the title or purchase of any lands by them held, or claimed." *Ibid.* However, Congress carved out an exception to the criminal prohibition permitting the agent of a State present at a treaty held under the authority of the United States—in the presence and with the approval of the federal commissioners—to "propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty." 1 Stat. 330-331. These provisions were carried forward without change in the Trade and Intercourse Acts of 1796, 1799, 1802 and 1834[3] and remain in effect today. 25 U.S.C. 177. See *Oneida Indian Nation* v. *County of Oneida* (*Oneida*), 414 U.S. 661, 668 & n.4 (1974).

3. After passage of the 1793 Act, the United States entered into the Treaty of Canandaigua of November 11, 1794 with the Six Nations. 7 Stat. 44 *et seq.* In Article II of that Treaty, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property." 7 Stat. 45. The United States stipulated that "the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase" (*ibid.*), and the Six Nations stipulated that "they will never claim any other lands within the boundaries of the United States." Art. IV, 7 Stat. 45.

[3] 1 Stat. 469, 472, § 12 (1796); 1 Stat. 743, 746, § 12 (1799); 2 Stat. 139, 143, § 12 (1802); 4 Stat. 729, 730, § 12 (1834).

4. Notwithstanding Section 8 of the 1793 Act, the State of New York, without federal participation or approval, negotiated directly with the Oneidas in 1795 for the purchase of some of the 300,000 acres that were reserved to them under their 1788 Treaty with the State and acknowledged by the Treaty of Canandaigua. Secretary of War Pickering informed Governor Jay that the Trade and Intercourse Act required that the purchase be negotiated under federal supervision and consummated pursuant to a federal treaty and informed the Oneidas that the purchase would be illegal in the absence of federal approval. Pet. App. 6a-7a; Supp. Pet. App. 11a-13a. Nevertheless, by an Indenture dated September 15, 1795, the State purchased approximately 100,000 acres of this land in return for an annual payment to the Oneidas of $2,952 (Pet. App. 76a, 78a)—approximately $.03 per acre. Within two years, the State sold much of the land to white settlers for approximately $3.53 per acre (Pet. App. 7a).[4]

5. Beginning as early as 1815, the State urged the removal of the New York Indians to the West. Some of the Indians, too, apparently came to believe that they should seek a new home. *New York Indians* v. *United States*, 170 U.S. 1, 6 n.1 (1898). In 1816, the President gave the New York Indians permission to negotiate with western Indian tribes for the purchase of land. In 1821, the Menominee Indians ceded some of their land in Wisconsin to several of the New York Tribes, including the Oneidas. Approximately 600 Oneidas settled in Wisconsin and approximately 600 remained behind at Oneida in New York. Because of a dispute between the New York Indians and the Menominees, the United States entered into the Treaty of February 8, 1831 with the Menominees to purchase certain of the Menominees' lands for the New York Indians. 7 Stat. 342, 343, 346-347. See generally F. Cohen, *Handbook of Federal Indian Law* 420 (1942). Few additional New York Indians moved to Wisconsin,

[4] Between 1795 and 1846, New York negotiated 25 additional treaties with the Oneidas, and by 1846, the Oneidas retained only a few hundred acres in New York (Supp. Pet. App. 14a).

however, and the pressures of white settlement were felt there as well. Accordingly, on January 15, 1838, the United States entered into the Treaty of Buffalo Creek with the New York Indians (7 Stat. 550 *et seq.*) to exchange their land in Wisconsin for a new reservation in the Indian Territory, in what is now Kansas. However, any New York Indians who already had moved to Wisconsin were permitted to remain there. Art. 1, 7 Stat. 551; Treaty of Feb. 7, 1838, United States-Oneidas at Green Bay, 7 Stat. 566 *et seq.*

Most of the New York Indians who remained in New York in 1838 did not remove to their new reservation in Kansas either. Several of the other New York Indian Nations thereafter succeeded in retaining or reacquiring rights to reservations in New York,[5] but the Oneidas did not. Approximately 320 of the Oneidas in New York instead moved to Canada. Most of the remaining Oneida lands in New York then were partitioned and sold pursuant to an 1843 state statute (1843 N.Y. Laws ch. 87). In 1846, 150 of the Oneida Indians who still were in New York moved to Wisconsin. By the turn of the century, of the Oneidas remaining in New York, approximately 150 were regarded as citizens of the State, and thus presumably had been integrated into the non-Indian population, while approximately 128 resided on the Onondaga Reservation. *New York Indians* v. *United States*, 40 Ct. Cl. 448, 452-455, 458-459, 468-472 (1905); Supp. Pet. App. 15a; H.R. Doc. 1590, 63d Cong., 3d Sess. 11 (1915). After virtually no New York Indians moved to the Indian Territory, the reservation set aside for them there was restored to the public domain and disposed of by the United States beginning in 1861. *New York Indians* v. *United States*, 170 U.S. at 12-13 n.1. The Wisconsin lands ceded by the New York Indians un-

[5] Treaty of May 20, 1842, United States-Seneca Nation, 7 Stat. 586 *et seq.*; *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1857) (Senecas); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867) (Senecas); *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 105-106, 121-123 n.18 (1960) (Tuscaroras); *New York Indians* v. *United States*, 170 U.S. at 13 n.1 (Tonawandas).

der the Treaty of Buffalo Creek also were made part of the public domain and disposed of by the United States (*id.* at 12 n.1), but the land retained by the Oneidas in Wisconsin in 1838 remained in reservation status and formed the basis of the current Reservation for respondent Oneida Indian Nation of Wisconsin.

SUMMARY OF ARGUMENT

I

A. Petitioners' argument that the Tribes do not have a right to sue to enforce their asserted interest in the lands in suit is contrary to the Court's 1974 opinion in this case. Moreover, the legislative history of 25 U.S.C. 233 shows that Congress intended that Indians would be entitled to sue in federal court based on land and treaty claims in New York, and Congress manifested such an intent with respect to Indian land and treaty claims generally when it enacted 28 U.S.C. 1362. The Tribes also have a right of action directly under the Trade and Intercourse Act of 1793 and its successors. Those Acts afford special protection for Indian property rights, which are uniquely the domain of federal law, and they render an unauthorized sale of Indian lands invalid "in law or equity," a phrase that expressly contemplates civil litigation. Other provisions of the Trade and Intercourse Acts affirmatively support the right of Indians to sue. Nor is the Tribes' suit barred by principles governing the "federal common law" announced in *Milwaukee* v. *Illinois*, 451 U.S. 309 (1981).

B. The political question doctrine does not require dismissal, because the Constitution, the Trade and Intercourse Acts and federal treaties do not vest exclusive remedial authority in Congress or the President.

C. Federal law does not incorporate a state statute of limitations so as to bar the Tribes' suit. The Court has held that state limitations do not govern such suits (*Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922)), and Congress specifically so provided for New York claims when it enacted 25 U.S.C. 233. The appropriate limitations period in suits by Indians instead is that applicable

under 28 U.S.C. 2415 to suits by the United States on their behalf, since the underlying claim is the same in either case. Moreover, incorporation of a shorter limitations period from state law could be inconsistent with the text and legislative history of 28 U.S.C. 2415 and the Indian Claims Limitations Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 *et seq.*

D. The 1795 sale was not ratified by a federally approved Treaty in 1798 by which the Oneidas conveyed additional land to the State. The Trade and Intercourse Acts required that a purchase of Indian land must itself be "made" by federal treaty, not simply be referred to in a later treaty, and there is no indication that the President or the Senate considered the terms or fairness of the 1795 transaction, as those Acts contemplated. Moreover, the Treaty of Canandaigua of 1794 demonstrates that the federal government would explicitly confirm prior treaties with New York when it intended that result.

II

Although the court of appeals correctly disposed of the only issues petitioners present for review, this does not mean that the Tribes are entitled to take possession of all 100,000 acres covered by the 1795 transaction. Two other issues should be considered in any future litigation: (A) whether the Oneidas relinquished their claim in the Treaty of Buffalo Creek in 1838, which provided for the sale of their remaining land in New York and their complete removal to a new reservation in Kansas, and (B) whether equitable considerations should limit or bar relief in a suit by the Tribes.

ARGUMENT

The court of appeals in this case affirmed a judgment of $16,694 plus interest against petitioner Counties of Madison and Oneida, New York, for their use and occupation for two years of 841 of the 100,000 acres that were acquired by the State of New York from the Oneida Nation in 1795 without the approval of the federal government. Although suits against current landowners

based on eastern Indian land claims raise a broad range of sensitive and difficult issues of law and equity, the Counties and the State have presented only a few issues for review by this Court and have thereby given this case a rather narrow cast.

Petitioners concede, for example, that the Trade and Intercourse Act of 1793 applied to the land in question,[6] and they do not challenge the district court's holding that the 1795 transaction was invalid under that Act. They also do not challenge the respondent Oneida groups' current status as "tribes" that may now invoke the protection of the 1793 Act.[7] The judgment below likewise does not affect arguments raised in other cases that certain eastern Indian land claims were validly extinguished by special federal statutes or treaties.[8] Still other eastern claims have now been resolved by Congress without the need for a judicial determination.[9] And even as regards the 1795 transaction at issue here, petitioners have not presented in this Court two substantial questions they raised in district court: whether the Oneidas' claim was relinquished in the Treaty of Buffalo Creek, and whether relief is limited or barred by equitable factors. See Point II, *infra*. They instead have limited their objections to the judgment against the Counties to four other questions. As we now explain in Point I, however, it is our view that the court of appeals' disposition of those issues was clearly correct.

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[6] Compare *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612 (2d Cir. 1980), cert. denied, 452 U.S. 968 (1981).

[7] Compare *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979); *Mashpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), cert. denied, No. 83-624 (Dec. 12, 1983); *James* v. *Watt*, 716 F.2d 71 (1st Cir. 1983), cert. denied, No. 83-623 (May 21, 1984).

[8] See page 27 & note 26, *infra*; *Catawba Indian Tribe* v. *South Carolina*, 718 F.2d 1291 (1983), reh'g en banc granted, No. 82-1671 (4th Cir. argued June 4, 1984).

[9] Rhode Island Indian Claims Settlement Act, 25 U.S.C. 1701 *et seq.*; Maine Indian Claims Settlement Act, 25 U.S.C. 1721 *et seq.*

I. THE COURT OF APPEALS CORRECTLY REJECTED THE ONLY OBJECTIONS PETITIONERS RAISED TO THE JUDGMENT AGAINST THE COUNTIES

A. The Tribes Have A Cause Of Action Based On An Asserted Current Right Of Possession Under Federal Law

1. Petitioners' primary contention—that respondent Oneida Nations and Band (the Tribes) do not have a cause of action under federal law to assert a current possessory right to the 841 acres in suit (see Counties Br. 12-30; N.Y. Br. 10-30)—is in our view contrary to the thrust of the Court's 1974 decision in this very case. To be sure, the Court did not then identify the issue as whether the Tribes had a "cause of action." But it seemed to have been taken for granted that the federal laws and treaties cited *did* confer legally enforceable rights on the Tribes. The only unresolved issue appeared to be whether the Tribes' suit to enforce those rights was one "arising under" federal law in the first instance, so as to be within the jurisdiction of the district court under 28 U.S.C. 1331 and 1362, or whether the Tribes instead were required to enforce their federal rights in state court. See, *e.g.*, N.Y. Amicus Br. at 35-43, *Oneida*, *supra*. The Court held that the Tribes' suit arose under federal law, and it contemplated that on remand the district court could reach an "ultimate resolution of the federal issues on the merits." 414 U.S. at 667.[10]

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[10] The Counties object (Counties Br. 14, 15) that the court below found a cause of action specifically for damages. In its prior opinion in this case, however, the Court accepted the court of appeals' premise that "the case was essentially a possessory action" (414 U.S. at 666; see also *id.* at 677-679), and Justice Rehnquist also observed in his concurring opinion that "the complaint in this action is basically one in ejectment" (*id.* at 683). The award of "damages" may be viewed as an accounting for mesne profits, a traditional feature of a suit for ejectment or other possessory action. See, *e.g.*, *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 74-84 (1823); *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 344 (1941). Under the doctrine of res judicata, the Tribes' deliberate election (see Pet. Br. at 13, *Oneida*, *supra*) not to seek an order requiring the

The Court did not suggest in 1974 that the Tribes might have a federally protected right to possess the lands at issue and yet be unable to vindicate that right in court. To the contrary, the Court's opinion discussed numerous cases in which the existence and nature of Indian rights were litigated in ejectment, quiet title, or similar actions. See 414 U.S. at 668-674. Most of the cases cited involved a suit brought by the United States on behalf of Indians or a suit between non-Indians. But the Court did not suggest that Indians, unlike everyone else affected, would be precluded from suing to invoke Indian rights in the land—rights the Court acknowledged to be " 'as sacred as the fee simple of whites.' " 414 U.S. at 668-669 (quoting *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835)). Indeed, the Court cited with approval (414 U.S. at 671) its prior decision in *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366 (1857), in which the Court affirmed a state court judgment in favor of a New York Indian in a trespass action against a non-Indian intruder on Seneca lands that also were protected by the Treaty of Canandaigua. Cf. *Three Affiliated Tribes* v. *Wold Engineering*, No. 82-629 (May 29, 1984), slip op. 9.

Also significant is the emphasis the Court placed on the text and legislative history of 25 U.S.C. 233, which authorizes the State of New York to exercise civil jurisdiction in cases involving Indians. The final proviso to 25 U.S.C. 233 precludes the exercise of jurisdiction by New York courts "in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The Court observed that this proviso was intended to permit the Indians to " 'go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto,' " because " 'they certainly ought to have a right to have those claims properly adjudicated' " (414 U.S. at 681-682, quoting 96 Cong. Rec. 12460 (1950) (remarks of Rep. Morris)). In the Court's view, its holding that there is federal jurisdiction over the instant case was "in furtherance" of this congressional intent. 414 U.S. at 682.

2. The Court's apparent understanding in 1974 that the Tribes have a cause of action under federal law was well grounded in congressional intent and this Court's decisions generally. In 1966, Congress enacted 28 U.S.C. 1362 to grant the federal district courts jurisdiction over suits brought by recognized Indian tribes if "the matter in controversy arises under the Constitution, laws, or treaties of the United States." The legislative history makes clear that 28 U.S.C. 1362 was intended to assure a federal forum for Indians to litigate questions regarding their lands (H.R. Rep. 2040, 89th Cong., 2d Sess. 2 (1966)), including "actions to quiet title to land claimed by Indian tribes" (*id.* at 5) and "claims [that] arise under special treaties between the United States and the tribes" (S. Rep. 1507, 89th Cong., 2d Sess. 2 (1966)). Moreover, as this Court observed in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976), Section 1362 was intended "to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not brought." Accord *Arizona* v. *San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983), slip op. 12-13 n.10; *id.* at 1-2 (Marshall, J., dissenting); *id.* at 5-7 (Stevens, J., dissenting); H.R. Rep. 2040, *supra*, at 2-3.

It is clear, as the Counties and State concede (Counties Br. 31-35; N.Y. Br. 25-26, 31-32 & n.*), that the United States could have brought the instant suit on behalf of the Oneidas to protect their treaty rights and to enforce the restraint on alienation contained in the Trade and Intercourse Acts. See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *United States* v. *Candelaria*, 271 U.S. 432, 441-444 (1926); *Heckman* v. *United States*,

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Counties to quit the premises might bar them from seeking actual possession of the 841 acres in the future. See Restatement (Second) of Judgments § 18(1) (1982); *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 17-20. But this peculiar feature of the case does not detract from its essential nature as a possessory action.

224 U.S. 413, 437-440, 444-445 (1912). In light of the congressional purpose embodied in 28 U.S.C. 1362, it follows that the Tribes also have a right of action. It is irrelevant whether Indian tribes were thought to have the capacity to sue in 1793, because Congress clearly had the authority to remove any incapacity and allow them to enforce their legal rights. Cf. *Seneca Nation* v. *Christy*, 162 U.S. 283 (1896).

Recognition of a right of action by the Tribes in this case therefore is fully consistent with the repeated view of Congress and this Court that "the Indians are entitled 'to take their place as independent qualified members of the modern body politic[,]' *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369 (1968), *quoting Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943)," and that "the Indians' participation in litigation critical to their welfare should not be discouraged." *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 8 (footnote omitted). See also *Creek Nation* v. *United States*, 318 U.S. 629, 640 (1943). The ability of Indians to sue also lessens the federal government's substantial burden of reviewing and litigating individual claims on their behalf and ensures that the vindication of Indian rights in court is not entirely at the mercy of the government's litigation decisions, allocation of scarce resources, and competing considerations. See *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968); *Cannon* v. *University of Chicago*, 441 U.S. 677, 706-708 & nn.41, 42 (1979); *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 16-17.

3. Petitioners ignore the express view of Congress and this Court that an Indian tribe may sue to protect its treaty and other property interests and argue instead (Counties Br. 12-24; N.Y. Br. 19-30) that the relevant question is whether a right of action by the Tribes should be "implied" under the Trade and Intercourse Acts. We disagree. Section 4 of the 1790 Act and its successors did not independently confer on Indians any property rights that they did not otherwise have. *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 348 (1941). Those

Acts essentially protected Indian property rights derived from *other* sources—treaties, statutes, or aboriginal occupancy—by rendering any purported sale of those rights void in the absence of federal approval. The Tribes therefore did not have to cite the Trade and Intercourse Acts in their complaint; it was sufficient for them to cite the federal treaties on which they based their current right of possession. When the Counties defended against this claim by asserting that they have a superior right of possession deriving from the 1795 purchase, the Tribes could overcome that defense by invoking the directive in the Trade and Intercourse Acts that no such purchase is "of any validity in law or equity" in the absence of federal approval. If the Tribes' suit thus is viewed as one asserting a present right of possession under federal treaties that remain in force, Congress has made clear that a tribe has the right to sue to enforce such a right.

4. The result is no different, however, if the Tribes' suit is thought to arise directly under the Trade and Intercourse Acts. Contrary to petitioners' contentions (Counties Br. 12-24, 28-30; N.Y. Br. 18-25), the factors this Court identified in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), plainly support a right of action under those Acts, without regard to more recent congressional action. First, the protection of Indian rights is the domain of federal law; it is not "in an area basically the concern of the States" (*ibid.*). Second, the statutory invalidation of unauthorized land transactions was intended in substantial part for the "*especial* benefit" of the Indians. *Ibid.* (emphasis in original) (quoting *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916)). As this Court observed in *FPC* v. *Tuscarora Indian Nation*, *supra*, the "obvious purpose of the statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them" (361 U.S. at 119).[11] The fact that Con-

[11] See also *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979); *United States* v. *Candelaria*, 271 U.S. at 441. See also 1 *American State Papers* (*Indian Affairs*), *supra*, at 140-142 (President Washington's message to Cornplanter, Chief of the Senecas:

gress also hoped that the provision in turn would lead to peace on the frontier (see Counties Br. 10, 21-22, 24) does not detract from this special protective purpose.

Petitioners argue (Counties Br. 13-14; N.Y. Br. 15-17, 21), however, that the text of the Act does not support recognition of a right of action because Section 8 of the 1793 Act (1 Stat. 330) was a criminal statute. This argument is without merit. The second clause of Section 8, upon which petitioners rely, made it a criminal offense even to negotiate with Indians for the purchase of lands. That clause has no application in this case, because the Tribes do not base their claim on illegal *negotiations*. They claim that the resulting *sale* was illegal. The relevant portion of Section 8 as regards that claim is the first clause, which provided that "no purchase or grant of lands [] or * * * of title or claim thereto" from an Indian nation "shall be of any validity in law or equity" unless made pursuant to federal treaty. This is a statutory command that the transcation is void; it is not a criminal prohibition.[12]

Moreover, the language of the first clause—mandating the invalidity of an unauthorized transaction "in law or equity"—plainly contemplates civil litigation. At the very least it permits the invalidity of the transaction to be raised defensively in private litigation. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18

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the restriction is "the security for the remainder of your lands. * * * The General Government will never consent to your being defrauded, but it will protect you in all your just rights.").

[12] The Counties erroneously assert (Counties Br. 10) that the only defect in the 1795 transaction was that no United States commissioner was present at the signing of the Indenture between the Oneidas and the State. Section 8 of the 1793 Act explicitly declared invalid any sale of Indian land unless "made by a treaty or convention entered into pursuant to the constitution" (see 1 Stat. 330)—*i.e.*, by a federal treaty made or approved by the President with the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 119. The proviso to the criminal prohibition in the second clause similarly stated that Indian claims "shall be extinguished by the treaty." The mere presence of a federal commissioner therefore would not have validated the sale.

(1979). But the legal consequences of voidness are typically not limited to countering claims made by an opposing litigant. Ordinarily, some form of affirmative relief also is available to the person for whose protection the statutory declaration of invalidity was intended. *Id.* at 18-19. In the context of a void conveyance of real property, a suit in ejectment would be an appropriate means to obtain that relief. As this Court observed in *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823), under the common law as it stood in 1789 and thereafter, "a right to land, by that law, include[d] the right to enter on it, when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it." Indeed, "[t]hat an action of ejectment could be maintained on an Indian right of occupancy and use, is not open to question." *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223, 232 (1850). Nothing in the language or legislative history of Section 8 of the 1793 Act suggests that Indians whose interests are directly at stake should be precluded from invoking that right.[13]

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[13] As the court of appeals observed (Pet. App. 23a n.15), the only indication in the background of the early Trade and Intercourse Acts is that suits by Indians were not precluded. In a message in December 1790, President Washington assured Cornplanter, Chief of the Senecas, that any treaty held without federal authority would not be binding. With respect to a particular past transaction, he stated that if the Senecas "have any just cause of complaint against [the purchaser], and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." 1 *American State Papers* (*Indian Affairs*), *supra*, at 142-143.

If President Washington meant that the lower federal courts would be open to Indians, he apparently was mistaken (see Counties Br. 20-21 n.18). But the reference to "federal courts" was adequate to include the Supreme Court. Forty years before *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), he might have thought that an Indian tribe could bring an original action in this Court as a "foreign state." In addition, this Court could have reviewed a state court judgment in a suit by an Indian tribe if it concerned a treaty, the Trade and Intercourse Acts, or aboriginal rights. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85. Moreover, even if we assume that President Washington was under a mistaken

Petitioners would infer such a preclusion from the presence of criminal sanctions and remedial measures in *other* sections of the 1793 Act. See Counties Br. 14-17, 18, 23; N.Y. Br. 15-17, 24-25. But most of the sections they cite dealt with wholly unrelated matters, such as the licensing of Indian traders (§§ 1-3, 1 Stat. 329), purchase of Indian horses (§ 6, 1 Stat. 330), and punishment of non-Indians who commit [redacted] crimes in Indian territory (§ 4, 1 Stat. 329). Petitioners therefore principally rely on Section 5 of the 1793 Act, which provided criminal sanctions for settlers on Indian lands and permitted the President to remove illegal settlers (1 Stat. 330). See 25 U.S.C. 180. With those remedies available, petitioners argue (Counties Br. 16, 23, 45-46; N.Y. Br. 16, 21, 24-25), there is no need to recognize a right in the Indians to bring their own suit against intruders. But it is commonplace in our legal order for landowners to have the right to bring a civil action even though trespass is a criminal offense (N.Y. Penal Law § 140.10 (McKinney Supp. 1983)) and law enforcement authorities may arrest and remove trespassers. See *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366, 368 (1859). There accordingly is no reason to believe that Congress would have viewed a trespass or ejectment action by an Indian tribe as inconsistent with the statutory scheme. Indeed, in *Fellows* v. *Blacksmith*, *supra*, this Court sustained a state court judgment in favor of an Indian in a trespass action against a non-Indian, even though the Trade and Intercourse Act of 1834 would have permitted prosecution or removal of the intruder.

In any event, a subsequent amendment makes clear that the provisions for prosecution and removal of settlers cannot be read to preclude Indians from suing to protect their property rights under the Trade and Inter-

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view of the jurisdiction of the lower federal courts, his observation at least indicates that the notion that an Indian tribe might sue was not so unthinkable as petitioners assert (Counties Br. 20-21 n.18; N.Y. Br. 13, 23).

course Acts.[14] Section 22 of the 1834 Act (4 Stat. 733), now set forth at 25 U.S.C. 194, provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

This Section obviously contemplates that Indians may sue to obtain title to or possession of lands. Moreover, the Court stressed in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 664 (1979), that this Section was part of the overall "design" of the Trade and Intercourse Acts "to protect the rights of Indians to their properties," specifically including provisions under which "non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions." These are the very features

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[14] The Counties also rely (Counties Br. 18-20) on the presence of a provision in the 1796 Act that was carried forward in the 1799 Act but not in the 1802 and 1834 Acts. Section 5 of the 1796 Act (1 Stat. 470) provided that if any person made a settlement on lands belonging to or secured by treaty to an Indian tribe, he would forfeit to the United States all his right, title and claim to those lands. The Counties argue that the provision for forfeiture to the *United States* is inconsistent with a right of action by the *tribe*. The Counties misapprehended the purpose of the statutory provision.

As its legislative history makes clear, Section 5 of the 1796 Act was directed at persons who had acquired the right of preemption to Indian lands—*i.e.*, who had purchased the lands from the State subject to the unextinguished right of Indian occupancy (see note 28, *infra*)—and then entered onto the lands without waiting for the Indian title to be extinguished. See 5 Annals of Cong. 894-895 (1796) (remarks of Rep. Holland); *id.* at 897 (remarks of Reps. Cooper and Crabb); *id.* at 898-899 (remarks of Rep. Hillhouse). The right that was to be forfeited to the United States under Section 5 accordingly was the intruder's right of preemption or claim to the underlying fee, not any interest purchased from the Indians. Nor was any special provision required for forfeiture of an interest acquired from the Indians, because Section 12 of the 1796 Act (1 Stat. 472) separately rendered such purchases invalid. But even if a right of occupancy illegally acquired from the Indians also was within the reach of Section 5 of the 1796 Act, that right

of Section 5 of the 1793 Act that petitioners argue are inconsistent with suits by Indians to enforce their rights under Section 8 of that Act. Petitioners' implied preclusion argument therefore is without merit.

5. Finally, petitioners object (Counties Br. 25-30; N.Y. Br. 11-19) to the court of appeals' recognition of a cause of action under the federal common law (Pet. App. 9a-13a). We must admit to considerable doubt about the utility of analyzing this case by reference to "federal common law" principles in other settings. This is not an instance in which a federal court has been asked for the first time to fashion a substantive rule of decision or standard of conduct, as in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), upon which petitioners rely. In its prior decision in this case, the Court characterized the principles that Indians' possessory interests may be extinguished only by the federal government and that Indian land transactions are void in the absence of federal consent as "rudimentary propositions" (414 U.S. at 670) derived from federal supremacy in Indian affairs under the Constitution and parallel sovereign prerogatives under the Articles of Confederation and the colonial regimes. *Id.* at 667-670.[15]

Nor was this constitutionally-based "federal common law" supplanted by Section 4 of the Trade and Intercourse Act of 1790 or its successors. Those Acts simply "put in statutory form" the rule that obtained even in the absence of a statute. *Oneida*, 414 U.S. at 678. Moreover, this Court repeatedly has enforced the principles pertaining to Indian property without pausing to decide whether their ultimate source is the Constitution, stat-

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presumably would have been restored to the Indians upon its forfeiture to the United States. The controversial addition of the forfeiture provision in 1796 and its unexplained deletion in 1802 therefore do not in the least undermine the right of the Tribes to sue.

[15] On September 22, 1783, the Continental Congress adopted a proclamation prohibiting the purchase or receipt of any gift or cession of Indian lands without the express authority of Congress and providing that any such transaction "is null and void, and that no right or title will accrue in consequence of any such purchase, gift, cession or settlement." 25 *Journals of the Continental Congress 1774-1789*, at 602 (1922). The identical principle under European rule is discussed in *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-597 (1823). A number of the States had similar rules. See, *e.g.*, *id.* at 555; *Lattimer* v. *Poteet*, 39 U.S. (14 Pet.) 4, 14 (1840).

utes, treaties, or a species of "common law" inhering in the nature of federal sovereignty and the course of dealing with Indians. For these reasons, we believe it is essentially irrelevant whether this case is thought to arise under the "federal common law" or the Trade and Intercourse Acts. Since the governing rules are settled, the only remaining function for a court under either view is to consider possible defenses in a possessory action brought to vindicate those principles and the nature of appropriate relief. "[A]bsent federal statutory guidance, the governing rule[s] of decision would be fashioned by the federal court in the mode of the common law." *Oneida*, 414 U.S. at 675. This is a traditional role for the courts in fleshing out the details of a cause of action Congress has created or endorsed. See, *e.g.*, *Transamerica*, 444 U.S. at 18-19.

B. The Tribes' Claim Does Not Present Solely Non-Justiciable Political Questions

Although the Tribes' right to sue is clear, the Counties assert that this case presents non-justiciable political questions. They first contend that there has been "'a textually demonstrable constitutional commitment of the issue to a coordinate political department'" (Counties Br. 45-46, quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)) because Section 5 of the 1793 Act delegated exclusive remedial discretion to the President. As we have shown, however, Section 5 does not preclude this suit. See pages 16-18, *supra*. In any event, that is a question of statutory construction, not a "political question."[16]

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[16] For similar reasons, petitioners err in contending (Counties Br. 46; N.Y. Br. 25-28) that Article VII of the Treaty of Canandaigua renders this case non-justiciable. Under Article VII, the United States and the Six Nations agreed that "private revenge" would not be taken for injuries done by individuals on either side, but that complaint instead should be made to the other side. 7 Stat. 46. A public lawsuit can scarcely be thought to be "private

For similar reasons, the Counties also err in arguing that there is " 'an unusual need for unquestioning adherence to a political decision already made' " (Counties Br. 45, 47-58 (quoting *Baker* v. *Carr*, 369 U.S. at 217); see also N.Y. Br. 28)—namely, the 1967 decision by the Secretary of the Interior not to sue on the Tribes' behalf because of the pendency of the Tribes' claim against the United States under the Indian Claims Commission Act of 1946 (25 U.S.C. (1976 ed.) 70 *et seq.*) based on the same transaction. See J.A. 42a-44a.[17] Indeed, Congress enacted 28 U.S.C. 1362 to provide Indian tribes with a federal forum especially when, as in 1967, the United States' decision not to sue might be attributable in part to a conflict of interest. See page 11, *supra*. Cf. Memo for the U.S. as Amicus Curiae at 10, *Oneida*, *supra*.[18]

C. The Tribes' Suit Is Not Barred By The Statute Of Limitations

Petitioners also contend (Counties Br. 31-35; N.Y. Br. 30-32) that the Tribes' suit is time-barred because the ten-year statute of limitations under New York law for

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revenge." Moreover, Article VII provides that Congress may "make other equitable provision for the purpose" of remedying injuries, and Congress clearly has now permitted Indians to sue. *Ibid.*

[17] The Oneidas have withdrawn their claim against the United States and therefore are not precluded by the doctrine of res judicata or collateral estoppel from seeking to recover land or damages from other parties. Cf. *United States* v. *Dann*, cert. granted, No. 83-1476 (May 29, 1984).

[18] The Counties speculate (Counties Br. 47-48) that disagreements among the three Oneida respondents could create difficulties in deciding who should share in the judgment. If the Tribes do not agree among themselves, however, this award could be divided by the district court or Congress could enact appropriate legislation. *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73 (1977). In any event, it is not clear why this disagreement among the plaintiffs renders their cases against the Counties non-justiciable. The State notes (N.Y. Br. 29) the potential for the judgment below to unsettle titles of thousands of current residents in the 100,000-acre area. However, a similar potential has not rendered other claims based on Indian title non-justiciable. See, *e.g.*, *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) at 600; *Chouteau* v. *Molony*, 57 U.S. (16 How.) 202, 203 (1853); *Felix* v. *Patrick*, 145 U.S. 317 (1892).

actions to recover real property (N.Y. Civ. Prac. Law § 212 (McKinney 1972)) should be incorporated into federal law.[19] This argument is inconsistent with this Court's decisions and the intent of Congress.

1. Unless Congress otherwise provides, the United States is not barred by any statute of limitations or laches in a suit to enforce a public right or assert a public interest. *United States* v. *Beebe*, 127 U.S. 338, 344 (1888). See also *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917). These principles apply equally to suits brought by the United States on behalf of Indians. *Nevada* v. *United States*, slip op. 30; *Board of Commissioners* v. *United States*, 308 U.S. 343, 351 (1939); *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926). Consistent with these holdings, the Court also has held that a state statute of limitations is inapplicable in a suit brought by an Indian to set aside a conveyance made in violation of a federal statutory prohibition. *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922). Petitioners offer no reason to depart from *Ewert* v. *Bluejacket*, and Congress clearly intends no such departure.

The final proviso to 25 U.S.C. 233, upon which this Court relied in its prior *Oneida* opinion (414 U.S. at 680-682), states that nothing in Section 233 shall be construed as "making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The legislative history establishes that this language was specifically intended to assure that the New York statute

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[19] We do not agree with the Counties' submission (Counties Br. 35-38) that any cause of action under the Trade and Intercourse Act of 1793 abated upon the expiration of the 1793 Act or its successors, the 1796 and 1799 Acts. The substance of the provision invalidating unauthorized transactions predated the 1793 Act and has remained in effect to this day. Congress could not have intended that the expiration of one in an unbroken series of such prohibitions would effectively render valid what theretofore had been void. Compare *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 313 (1964).

of limitations would *not* apply to pre-1952 land claims (96 Cong. Rec. 12460 (1950) (remarks of Rep. Morris)):

> As it is now, the Indians, as we know, are wards of the Government and, therefore, the statute of limitations does not run against them as it does in the ordinary case. This will preserve their rights so that the statute will not be running against them concerning those claims that might have arisen before the passage of this act.

Application of the state statute of limitations here therefore would be inconsistent with the clear intent of Congress.

For two reasons, the applicable rule in suits by Indian tribes instead should be derived from 28 U.S.C. 2415, which establishes the statute of limitations for suits brought by the United States on behalf of Indians.[20] First, because the same underlying claim is involved whether the suit is brought by the United States or the Tribe, "the similarity of the rights asserted in the two contexts" alone suggests that the same limitations period should govern both. *DelCostello* v. *Teamsters*, No. 81-2386 (June 8, 1983), slip op. 18. This conclusion also is consistent with the congressional policy embodied in 28 U.S.C. 1362. Second, there ordinarily is close coordination between the United States and the tribes in evaluating a claim for possible litigation. Applying the limitations period in 28 U.S.C. 2415 to suits by tribes would discourage premature suits by Indians when an evaluation by federal officials in consultation with the Indians might reveal that the claim lacks merit or warrants settlement. *See*, e.g., S. Rep. 96-569, 96th Cong., 2d Sess. 5 (1980). Cf. *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 367-371 (1977). By the same token, application of a shorter state limitations period to suits by Indians would not accomplish the goal of repose, because the United States would retain the right to sue on the same claim. The practicalities of the situation and the

[20] Accord *Capitan Grande Band of Mission Indians* v. *Helix Irrigation Dist.*, 514 F.2d 465, 470-471 (9th Cir.), cert. denied, 423 U.S. 874 (1975); cf. 80 Interior Dec. 220 (1973).

need for uniformity therefore also indicate that the limitations period for suits by the United States and Indians should be the same. *DelCostello*, slip op. 10, 19; *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958).

2. In any event, the text and background of 28 U.S.C. 2415 and the Indian Claims Limitations Act of 1982 (Pub. L. No. 97-394, 96 Stat. 1976 *et seq.*) confirm that they also should govern in suits brought by the Indians themselves. Sections 2415(a) and (b), which apply to tort and contract suits by the United States generally, contain a separate limitations period of six years and 90 days for such suits brought on behalf of Indians. Section 2415(c) in turn excludes from these limitations all actions "to establish the title to, or right of possession of, real or personal property." Contract and tort claims that accrued prior to the July 18, 1966 effective date of Section 2415 were deemed to have accrued on that date. 28 U.S.C. 2415(g). As the period for pre-1966 Indian claims was about to expire in 1972, Congress became concerned that many older Indian claims would be lost. H.R. Rep. 92-1267, 92d Cong., 2d Sess. 3-6 (1972); S. Rep. 92-1253, 92d Cong., 2d Sess. 2-5 (1972). Congress therefore extended the limitations period for damage claims on behalf of Indians to 1977, and later to 1980 and 1982. Pub. L. No. 92-485, 86 Stat. 803; Pub. L. No. 95-64, 91 Stat. 268; Pub. L. No. 95-103, 91 Stat. 842; Pub. L. No. 96-217, § 1, 94 Stat. 126.

Finally, in the Indian Claims Limitations Act of 1982 Congress established a procedure to bring these older claims to a close. Congress directed the Secretary to publish a list of all outstanding pre-1966 claims in the *Federal Register*, to provide the Indians an opportunity to propose additional claims, and then to publish a final list of additional pre-1966 claims that were to be preserved. The two lists were published on March 31 and November 7, 1983, respectively (48 Fed. Reg. 13698, 51204), and the Oneidas' claim is contained on them (*id.* at 13920). Accordingly, as petitioners concede (Counties Br. 32, 34, 35; N.Y. Br. 31-32), the United States is not barred from bringing a damage action on the Oneidas'

behalf.[21]

Section 5(b) of the Indian Claims Limitations Act (96 Stat. 1978) requires the Secretary to notify and furnish relevant evidence to the tribe affected if he decides in the future to reject any of the listed pre-1966 claims for litigation. Conspicuously, Section 5(c) then provides that "any right of action"—not simply a right of action by the United States—"shall be barred" unless the complaint is filed within one year of the Secretary's rejection of the claim or within three years of his transmittal to Congress of a proposed legislative resolution of it. 96 Stat. 1978; accord 28 U.S.C. 2415(a) and (b) (final provisos). The obvious purpose of this procedure is to furnish formal notification to the affected Indians whenever the Secretary has decided not to file suit on their behalf and to allow them a reasonable opportunity to file their own suit. See H.R. Rep. 97-954, 97th Cong., 2d Sess. 9 (1982). Compare 42 U.S.C. 2000e-5(f)(1) (right to sue letter under Title VII). Application of a shorter state limitations period would frustrate this scheme.

Moreover, the Senate report on the 1980 extension of the limitations period for pre-1966 damages claims explicitly states—with reference to 28 U.S.C. 2145(c)—that "[t]he statute of limitations does not bar an Indian tribe, band, group, an individual Indian, or the United States acting on their behalf from bringing a claim for title to lands." S. Rep. 96-569, *supra*, at 4. This clearly reflects a congressional intent that a tribal possessory action such as that involved here is *not* barred by a statute of limitations. The statements in the legislative history upon which petitioners rely (Counties Br. 32-33; N.Y. Br. 31 n.*) in arguing that 28 U.S.C. 2415 is inapplicable to suits by Indians all suggest that the Indians might not be barred from suing for damages even *after* the United States is time-barred under 28 U.S.C.

[21] Under 28 U.S.C. 2415(a) and (b), any action by the United States on behalf of an Indian tribe for money damages based on a claim that is *not* included on the Secretary's lists now is barred unless it was filed within 60 days after publication of the second list on November 7, 1983.

2415(a) and (b).[22] See also S. Rep. 96-569, *supra*, at 4; H.R. Conf. Rep. 96-843, 96th Cong., 2d Sess. 3 (1980). In our view, these observations, all of which were made in 1980 or earlier, are no longer accurate, because Congress clearly indicated in 1982 that suits by Indians should be governed by 28 U.S.C. 2415 and the Indian Claims Limitations Act. But however that may be, the passages upon which petitioners rely obviously do not suggest that a *shorter* limitations period drawn from state law should govern. The legislative history also establishes that the extensions of the statute of limitations were intended to preserve damage actions based on eastern Indian land claims, including those of the Oneidas.[23] That congressional intent should control here.

D. The 1795 Transaction Was Not Ratified By Federally Approved Treaties In 1798 and 1802

Petitioners' final contention—and their only contention on the merits—is that the 1795 transaction, even

[22] See 126 Cong. Rec. 3289 (1980) (remarks of Sen. Melcher); *id.* at 3290 (remarks of Sen. Cohen); *id.* at 5745 (remarks of Rep. Clausen); *id.* at 5747 (remarks of Reps. Marlenee and Danielson); 123 Cong. Rec. 22166, 22499 (1977) (remarks of Rep. Cohen); *id.* at 22168, 22507 (remarks of Rep. Dicks); *id.* at 22500 (remarks of Rep. Foley); *id.* at 22509 (remarks of Rep. Studds); *id.* at 22510 (remarks of Rep. Yates); *Statute of Limitations Extension: Hearing Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 1st Sess. 11, 312-314 (1979); *Statute of Limitations Extension for Indian Claims: Hearings on S. 1377 Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 76-77 (1977); *Time Extension for Commencing Actions on Behalf of Indians: Hearing on S. 3377 and H.R. 13825 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. 23 (1972). But cf. *id.* at 19.

[23] See, *e.g.*, H.R. Rep. 96-807, 96th Cong., 2d Sess. 9 (1980); S. Rep. 96-569, *supra*, at 3, 10-13; H.R. Rep. 95-236, 95th Cong., 1st Sess. 5 (1977); 126 Cong. Rec. 3288 (1980) (remarks of Sen. Cohen); *id.* at 5745 (remarks of Rep. Danielson); *id.* at 5746 (remarks of Rep. Mitchell); *id.* at 5748 (remarks of Rep. Holland); *id.* at 5749 (remarks of Rep. Sawyer); *id.* at 5749-5750 (remarks of Rep. Hanley); 123 Cong. Rec. 22165 (1977) (remarks of Rep. Danielson); *id.* at 22165-22166 (remarks of Rep. Cohen); *id.* at 22168 (remarks of Rep. Walsh); *1979 Hearings*, *supra* note 22, at 15-16, 312-313.

though concededly invalid when made, was ratified by federally approved treaties in 1798 and 1802 in which the Oneidas ceded additional land to the State. See Counties Br. 39-44; N.Y. Br. 32-36. Only the 1798 treaty has ever been regarded as effective, however,[24] and any ratification argument therefore must be confined to the 1798 treaty.

This Court has held that congressional intent to extinguish Indian title must be "clear," "plain" and "unambiguous," and will not be "lightly implied," in view of the "avowed solicitude of the Federal Government for the welfare of its Indian wards" (*United States* v. *Santa Fe Pacific R.R.*, 314 U.S. at 346, 353-354). Petitioners have pointed to no evidence, much less plain and unambiguous expressions, that approval of the 1798 Treaty by the President and the Senate actually was intended by them to constitute affirmative approval of the 1795 transaction. Petitioners' entire ratification argument instead is based on two passages in the metes and bounds description of the lands ceded by the Oneidas in 1798 that refer to a lot in the "last purchase" from the Oneidas. These passing references to the 1795 purchase are insufficient to constitute a ratification of that purchase.

First, the Trade and Intercourse Acts of 1793 and 1796 provided that no purchase of Indian lands would be of any validity unless "made by treaty or convention entered into pursuant to the constitution" (§ 8, 1 Stat. 330;

[24] The 1798 and 1802 Treaties both were approved by the Senate (1 *Journal of the Executive Proceedings of the Senate of the United States* 312 (1799); *id.* at 428 (1802)), but neither is printed in Volume 7 of the Statutes at Large, which was intended to be a compilation of "all treaties with * * * Indian tribes." See J. Res. 10, 5 Stat. 799. However, there is evidence that President Adams approved the 1798 Treaty (John Adams' Journal of Executive Acts—March 1797-March 1799 (entry dated Feb. 23, 1799), *reproduced in Adams Family Papers, John Adams Misc.* (Lib. Cong. Reel No. 194)), and that Treaty is included in a list compiled by the President in 1822 of Indian treaties that extinguished Indian title in New York (H.R. Doc. 74, 17th Cong., 1st Sess. 8 (1822)). Accordingly, the 1798 Treaty would appear to be valid. We are unaware, however, of any comparable indication that the 1802 Treaty was approved by the President or regarded as being in force.

§ 12, 1 Stat. 472). A mere reference to the 1795 purchase in a subsequent treaty does not satisfy the statutory requirement that the purchase itself be "made" by a federal treaty or manifest the formal and considered federal approval Congress intended.[25] Second, there is no indication that the President or the Senate had before them in 1798 either the 1795 indenture or a report by a responsible federal official explaining its terms and recommending its approval. Because the Trade and Intercourse Acts were intended to prevent unfair dispositions of Indian land, we cannot assume that the President and the Senate would approve the transaction in the absence of such information, especially in light of the Executive's prior opposition to the State's negotiating with the Oneidas for the 1795 purchase (see page 4, *supra*).

Third, in the Treaty of Canandaigua of 1794 just four years earlier, the federal government demonstrated that it knew how to ratify prior transactions with New York when it wished to do so. In Article II of that Treaty, the United States explicitly "acknowledge[d]" the lands reserved to the Oneidas "in their * * * treaties with the state of New-York * * * to be their property" and agreed to protect the Oneidas in their possession in return for the Oneidas' promise not to claim other lands. 7 Stat. 45.[26] Compare *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 602-604 (1823). The passing references to the 1795 transaction in the 1798 Treaty are exceedingly casual by comparison and cannot be thought to manifest

[25] The 1798 Treaty was essentially a deed by which the Oneidas conveyed the land described to the State, and the language employed therefore does not imply an intent by the President and Senate to approve some *other* transaction. This is not a case in which language employed by Congress itself in passing a later law is said to reflect an affirmative congressional intent to approve a prior transaction. See, *e.g.*, *Seneca Nation* v. *United States*, 173 Ct. Cl. 912, 915 (1965).

[26] The Tribes contend in separate litigation that this language in the 1794 Treaty does not extinguish their claims to the lands ceded to New York in 1788. See *Oneida Indian Nation* v. *New York*, 691 F.2d 1070, 1096-1097 (2d Cir. 1982). We do not support that argument.

an equivalent expression of intent by the President and Senate to extinguish Indian claims. Nor is there any indication that the 1795 transaction was thereafter regarded as having received the requisite federal approval. Significantly, for example, the land ceded under it was not listed in the President's 1822 compilation of New York lands to which Indian title had been extinguished. See H.R. Doc. 74, 17th Cong., 1st Sess. 7-8 (1822).

II. ADDITIONAL CONSIDERATIONS NOT RAISED BY PETITIONERS MIGHT BAR RECOVERY OR LIMIT RELIEF IN OTHER CASES

As we have explained in Point I, the court of appeals' disposition of the only four issues the Counties have presented for review by this Court was clearly correct. For this reason, we are constrained to conclude that the judgment of the court of appeals should be affirmed insofar as it sustains the district court's judgment for the Tribes against the Counties.[27]

There can be no blinking the fact, however, that the award of a money judgment for wrongful occupation of land that the Oneida Nation itself sold 190 years ago is, as the Counties put it, "extraordinary." Counties Br. 9. And because the money judgment is premised on the conclusion that the Tribes have a current right to possess the 841 acres in suit (but see note 10, *supra*), affirmance of the judgment below could be understood to imply that the Tribes have the right to take possession of all 100,000 acres involved in the 1795 transaction from the thousands of residents and businesses that now occupy the land (although it presumably would not call into question the validity of the current owners' underlying fee interest).[28] But, in our view, that is not the necessary consequence of the decision below.

As an initial matter, what the court of appeals held is that the Tribes retain a right to occupy the 841 acres. Congress has the power to extinguish that right at any time, with or without compensation, simply by ratifying the 1795 transaction. For this reason, the decision below, however "extraordinary," is nonetheless consistent with the established principle that Indian title is "protected by the political power" (*Clark* v. *Smith*, 38 U.S. (13 Pet.) 195, 201 (1839)) and is to be "respected by all courts until it be legitimately extinguished" (*Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810)). Congress has enacted legislation to extinguish Indian title and claims related thereto in other eastern States (see note

[27] We do not address the question whether the Counties have a claim for indemnity against the State and whether any such claim is barred by sovereign immunity. It is clear that the United States would not be barred from bringing an action directly against a State to recover land it acquired in violation of the Trade and Intercourse Acts and to recover mesne profits owing as a result of the unauthorized occupation of the land. *United States* v. *Minnesota*, 270 U.S. 181, 193-195 (1926). In light of Congress's intent in enacting 28 U.S.C. 1362, an Indian tribe probably also is not barred by sovereign immunity from bringing such an action against a State. *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. at 472-475. Cf. *Arizona* v. *California*, slip op. 7 ("[a]ssuming *arguendo*" that sovereign immunity would bar a suit by a tribe against a State). This view is reinforced by the specific intent of Congress in enacting the Trade and Intercourse Acts to invalidate unauthorized State purchases because of prior overreachings. However, because the Tribes did not bring an action directly against the State, there is no occasion to consider the application of sovereign immunity principles in such a setting.

[28] The State owned the underlying fee in the land occupied by Indians in the Eighteenth Century. *Oneida*, 414 U.S. at 670. In the 1788 Treaty with New York, the Oneidas ceded their lands (*i.e.*, their right to occupy the lands) to the State; there was "reserved" from that cession some 300,000 acres, which had the effect of preserving the Oneidas' right to occupy those lands. If, as appears, the State therefore retained its ownership of the underlying fee to those 300,000 acres after 1788, it was free to make encumbered grants of the 100,000 acres involved in the 1795 purchase from the Oneidas even before that transaction and without regard to its validity. But, of course, the Indian right of occupancy subsisted until extinguished by the federal government. See *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 142-143 (1810). For these reasons, the Counties' assertion (Counties Br. 10) that "thousands of titles" to land in the 100,000-acre area have been "declared useless scraps of papers" is incorrect. The State presumably is required to respect its prior grants of the fee to those lands and the current titles based on those grants. When the Oneidas' right of occupancy is extinguished, the owners would have a complete fee interest in the land.

9, *supra*), and it could be expected to do the same in New York should the occasion arise. Nor is the reach of the decision below limited by the prerogatives of Congress alone. There are at least two other considerations that petitioners have not presented for review by this Court but which might limit or even bar relief in future cases.

A. In *Santa Fe*, the Walapais Indians had requested that a reservation be created for them because white settlers had entered onto their traditional domain, and such a reservation was established by Executive Order. The Court explained the consequences of this arrangement (314 U.S. at 358):

> In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. * * * Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.

The question arises whether the Oneidas might not have made a similar relinquishment in the Treaty of Buffalo Creek of 1838.

The New York Indians formally accepted and urged ratification of the United States' Treaty with the Menominees that secured land for them in Wisconsin, concluding that the land provided was sufficient "to answer all the wants of the New York Indians" (7 Stat. 409 App.). In the Treaty of Buffalo Creek of 1838, the New York Indians ceded all of those Wisconsin lands—except for a small portion occupied by the New York Indians (principally Oneidas) who had moved to Wisconsin (Art. 1, 7 Stat. 551)—in exchange for a new reservation in the Indian Territory. The Preamble to the 1838 Treaty

recites that the New York Indians had "applied to the President to take their Green Bay lands, and provide them a new home among their brethren in the Indian Territory." 7 Stat. 550.

"[T]he agreement of the Indians to remove beyond the Mississippi" was "[p]robably * * * the main inducement" for the United States to set aside the new reservation in the Indian Territory (*New York Indians* v. *United States*, 170 U.S. at 15), and the Treaty obviously contemplated their complete removal from New York. The new reservation was described in the Treaty as "a permanent home for *all* the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes" (Art. 2, 7 Stat. 551 (emphasis added)).[29] Moreover, the Treaty itself provided for the disposition of all of the Indians' remaining land in New York. In Article 10, the Senecas sold their four reservations in New York to non-Indians who had purchased the right of preemption (7 Stat. 553). See also Art. 14, 7 Stat. 554 (disposing of Tuscaroras' land). Similarly, the Oneidas residing in New York "agree[d] to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. 554.

"These proceedings, by which these tribes divested themselves of their title to lands in New York, indicate an intention on the part, both of the Government and the Indians, that they should take immediate possession of the tracts sets apart for them in Kansas." *New York Indians* v. *United States*, 170 U.S. at 21. A court might well conclude that it "cannot now be fairly implied" (*Santa Fe*, 314 U.S. at 358) that the Indians nevertheless were to retain a claim to *other* lands in New York that they no longer even occupied in 1838. Accordingly,

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[29] Similarly, the new reservation was of sufficient size to furnish 320 acres for each of the New York Indians in Wisconsin and New York who had been enumerated in a census appended to the Treaty. Art. 2, 7 Stat. 551; 7 Stat. 556 (Sched. A).

their request for and acceptance of a new reservation might "be regarded in law as the equivalent of a release" and "relinquishment" of any tribal rights they had in the lands they no longer occupied in New York. *Ibid.* Those lands not only were "notoriously claimed by others" (*ibid.*)—the white settlers who had moved into the area by 1838; they had been sold by the Oneidas themselves for disposition to white settlers. It is true that few New York Indians actually moved to their new reservation in Kansas. But the Court in *Santa Fe* found a relinquishment even though many Walapais likewise did not move to their new reservation and it was of little value to them for a considerable period. 314 U.S. at 357.

It might be argued that the Treaty of Buffalo Creek and any relinquishment it embodied were effectively rendered void when the New York Indians did not remove to Kansas. But subsequent events cast some doubt on that argument as well. In 1893, Congress passed a special jurisdictional statute (Act of Jan. 28, 1893, ch. 52, 27 Stat. 426 *et seq.*) permitting the New York Indians to seek compensation for the Kansas lands. The Court of Claims in fact held that the 1838 Treaty had failed because the Indians were not removed from New York to Kansas, and it denied recovery on that basis. *New York Indians* v. *United States*, 30 Ct. Cl. 413, 458-460 (1895). But this Court reversed. It held that the 1838 Treaty vested title to the Kansas reservation in the New York Indians and that the Indians had not forfeited their rights under the Treaty by failing to move there. *New York Indians* v. *United States*, 170 U.S. at 14-21, 24-25, 28-35. The Court accordingly held that the Indians were entitled to a money judgment for the amount the United States received when it sold the Kansas land to settlers. 170 U.S. 614 (1898). That award was divided among all of the New York Indians, including the Oneidas in Wisconsin and New York and those who moved to Canada in the 1840's. See *New York Indians* v. *United States*, 40 Ct. Cl. at 458-461, 468-472. Because each of the constituent Oneida groups successfully sued to enforce its rights under a treaty that was intended "to release the Eastern

land from Indian tenure" (30 Ct. Cl. at 450), a court might conclude that the Oneidas should not now be heard to contend that much of New York was not released from Indian tenure after all. Cf. *United States* v. *Dann*, cert. granted, No. 83-1476 (May 29, 1984).[30]

We have not, however, reached a concluded view on the relinquishment question. That would require further examination of the circumstances surrounding the Treaty of Buffalo Creek and subsequent events, including the Indians' understanding of the transaction (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675-676 (1979)) and the relevance, if any, of the United States' acknowledgment in the Treaty of Canandaigua of the Oneidas' interest in the land.

B. A question remains whether equitable considerations should limit the relief available to the present-day Oneida groups. The Counties interposed such an objection in district court (Supp. Pet. App. 27a-30a), but they do not appear to have presented it on appeal and they have not presented it for review by this Court. Some consideration of the question is nevertheless appropriate, in our view, in order to illuminate the context in which the issues that are before the Court might be resolved in future cases.

Here, as in *Board of Commissioners* v. *United States*, 308 U.S. 343, 349 (1939) (a suit to recover taxes improperly levied on Indian land), Congress has not specifically provided for "the nature and extent of relief in case loss is suffered"—in this case, the loss resulting from a void conveyance or wrongful occupation of Indian land. Congress instead has "left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature" (*id.* at 351). Even in

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[30] The legislative history of the special jurisdictional statute also reflects an understanding that the New York Indians "gave up the New York lands." 24 Cong. Rec. 588 (1893) (remarks of Sens. Hiscock and Platt); *id.* at 705 (same).

suits brought by the United States, then, Congress may be thought to have left the courts free, when fashioning a remedy, to "take into account appropriate considerations of 'public convenience'" (*ibid.*); to give "due regard for local institutions and local interests" (*ibid.*); and to weigh such factors as "unexcused delay," "considerations of fairness," and the relative innocence of the defendant (*id.* at 352-353). But there is no need to consider at this time whether or to what extent these principles apply in suits brought by the United States to set aside a void conveyance of tribal land. This is so because, in our view, such principles plainly *do* apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest in enforcing the prohibitions against unauthorized purchases of tribal land[31] and the tribe itself has sued to repudiate its own prior transaction and assert its own possessory rights. Cf. *United States* v. *Hellard*, 322 U.S. 363, 366 (1944).

Equity might inform the court's judgment in a variety of ways. Under settled doctrine, for example, equitable considerations could have a direct bearing on the court's award of money damages for past use and occupation of the land. In our view, the award of money damages in a case such as this should be regarded as the "familiar remed[y,] equitable in [its] nature" (*Board of Commissioners*, 308 U.S. at 351), of requiring an accounting for mesne profits ancillary to a possessary action. See note 10, *supra*. Ordinarily, the plaintiff in such an action is entitled to recover profits and rents from the time his

[31] The Trade and Intercourse Acts can be said to have established a guardian-ward relationship between the United States and the Indians in a moral or political sense, growing out of the intended federal oversight of Indian land transactions. See *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 70. But we do not believe that those Acts were understood to establish a "trust" relationship in a legal sense that would *compel* the United States to sue to set aside any conveyance made without the approval of the federal government. Compare *United States* v. *Mitchell*, 445 U.S. 535, 540-546 (1980). Cf. *Nevada* v. *United States*, slip op. 16-17; but cf. *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975).

title accrued, subject to any applicable statute of limitations. But an award of mesne profits may be limited even where, as here, recovery is not barred by the statute of limitations (see pages 20-25, *supra*), if there are countervailing equitable factors, such as an absence of notice to the defendant of the plaintiff's adverse claim or laches by the plaintiff in asserting it. In that event, an accounting for mesne profits might be confined to the period *after* the plaintiff filed suit. See, *e.g.*, *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 78-85 (1823).[32]

It therefore might have been argued in this case that the Tribes were not entitled to any monetary recovery from the Counties for the years 1968 and 1969—the two years *prior* to the filing of the complaint—if the Counties did not have notice of the Tribes' adverse claim or if the Tribes were deemed guilty of laches in pursuing it. Although the Counties have not challenged the judgment against them on this ground, an award of monetary relief might be limited or barred on this ground in any future case against private landowners. Cf. *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. at 373.[33] More-

[32] In addition, in accounting for mesne profits, a bona fide occupant of the land is permitted to offset the value of improvements, as the court of appeals held in this suit (Pet. App. 34a). See *Green* v. *Biddle*, 21 U.S. (8 Wheat.) at 81-85.

[33] Other landowners in the 100,000-acre area of course now have generalized "notice" of the Tribes' adverse claim by virtue of whatever publicity has surrounded this suit against the Counties. However, the Tribes deliberately refrained from suing private landowners, perhaps because they expect a legislative resolution or for some other reason do not desire or anticipate that private landowners will actually be removed from their land or be made to answer in damages. A court might conclude in these circumstances that the liability of other landowners for mesne profits should not begin to run at least until they have personally been sued by the Tribes, because it would be unrealistic to expect them to vacate their premises in the face of an adverse claim that the Tribes have hesitated to press and unfair for the Tribes to refrain from suing and yet demand that the monetary liability of the landowners accrue while they do so. Indeed, since the Tribes themselves conveyed their interest in the property in the 1795 transaction upon which the current land-

over, even if the Tribes sought an actual order of ejectment in a future case, which they refrained from doing here, a monetary adjustment or offset presumably could be required to account for any improvements the current non-Indian occupants made on the land. *Green* v. *Biddle*, 21 U.S. (8 Wheat.) at 81-82.

Nor do we suggest in the circumstances of an Indian land claim such as that involved here that a court would necessarily be bound by rules regarding the award of mesne profits developed in more conventional settings. "Equity eschews mechanical rules; it depends on flexibility" (*Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946)) in order that the court may "locate 'a just result' in light of the circumstances peculiar to the case" (*Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. at 373, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424-425 (1975)). For example, if the equities appeared to warrant, a court might limit monetary relief to requiring a landowner to disgorge only those rents or profits he *actually* received, rather than requiring a private homeowner to pay the Tribes whatever amount he *might* have realized if the land had been rented to others or used for a profitable venture. Cf. *New Orleans* v. *Gaines*, 131 U.S. 191, 217-219 (1889); but see, *e.g.*, *Dime Savings Bank* v. *Altman*, 275 N.Y. 62, 9 N.E.2d 778 (1937).

In extreme circumstances, it is arguable that equitable considerations might even wholly bar relief in a suit by an Indian tribe (cf. *Kirk* v. *Hamilton*, 102 U.S. 68 (1880)), even though they would not in a suit by the United States (see *Utah Power & Light Co.* v. *United States*, *supra*). For example, in *Felix* v. *Patrick*, 145 U.S. 317, 330-335 (1892), this Court relied on equitable considerations in requiring dismissal of a suit. In *Felix*, an Indian had acquired scrip that entitled her to locate land on the public domain and then conveyed it (along

owners rely for their right of possession, it is conceivable that a court might conclude that the landowners' liability should not begin to run in a suit by the Tribes until the court has actually rendered a decision invalidating that transaction.

with a quitclaim deed and power of attorney in blank) to a non-Indian, in violation of a statutory provision rendering any conveyance of scrip void. Twenty-seven years later, the heirs of the Indian filed a bill in equity seeking to have the court set aside the conveyance of the scrip and to declare that all of the lands and proceeds acquired by the non-Indian and his successors in interest through use of the scrip were held in a constructive trust for the heirs' benefit. The Court affirmed the dismissal of the bill for want of equity, stressing that a large part of the land sought to be recovered by the Indian plaintiffs had since "been platted and recorded as an addition to the city of Omaha, and * * * sold to purchasers * * * [with little, if any] notice of the infirmity [of] their title" (145 U.S. at 326) and that substantial improvements had been made on the land (*id.* at 334). The Court also stressed the disproportion between the original value of the scrip ($150) and the value of the improved property the Indians sought to possess ($1 million) (*ibid.*).[34]

There are, to be sure, differences between *Felix* v. *Patrick* and this case. This case involves a void conveyance by a tribe, not an individual Indian; moreover, here, unlike in *Felix*, Congress did *not*, under the decision below, formally relinquish federal control over the land in question. Cf. *Oneida*, 414 U.S. at 675-678; *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 670-671. But although these factors might weigh against interposing an equitable bar, the countervailing factors weighing in favor of such a bar have even greater force here than they did in *Felix*. The delay in filing suit is far longer; the disproportion between the original and current values of the property presumably is far greater; and we may assume that the relationship between the current landowners

[34] In contrast, in *Ewert* v. *Bluejacket*, 259 U.S. 129, 138 (1922), the Court declined to apply the defense of laches in a suit by an Indian where legal title was still in the hands of the original purchaser and there was no good faith transaction. *United States* v. *Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976); *United States* v. *Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

and the original wrongdoer (the State) is for the most part considerably more attenuated. In addition, the Oneidas apparently had more opportunities than did Felix and her heirs to repudiate or challenge the invalid transaction and thereby dispel the impression of having abandoned any claim they might have had to the land.[35] Finally, whatever the relative stature and numbers of

[35] It is well established that Indians could abandon their aboriginal lands and thereby relinquish any claim to them, without the need for the approval of the presiding sovereign. See, *e.g.*, *Mitchel* v. *United States*, 34 U.S. (9 Pet.) at 745. Where the Indians did not unilaterally depart from the land, but instead left after selling it, the purpose of the Trade and Intercourse Acts to prohibit such unauthorized transactions would be undermined by a holding that the tribe had abandoned the land at the moment of sale. But it does not necessarily follow that Indians must thereafter have a right in perpetuity to repudiate the transaction or sue on their own behalf to have it set aside. Other persons who were under a legal disability at the time of a transaction ordinarily do not have an unlimited period of time to repudiate the transaction after the disability is removed. Cf. *Chouteau* v. *Molony*, 57 U.S. (16 How.) at 237-238. In this case, the Indians' disability to sell the land has not been removed. Nevertheless, it could be argued that the purpose of protecting Indians in their possession of property by affording them a right to sue is sufficiently accomplished after passage of a reasonable period of time during which the Indians could disavow an unauthorized transaction and thereby negative any inference that they had voluntarily abandoned their claim to the land, at least if compelling countervailing equities accrue during that period.

This is not to say that the title or right of occupancy the non-Indian purchased from the Indians would be valid as against the *sovereign* and its grantees after their passage of time. The restraint on alienation embodied in the Trade and Intercourse Acts also served the important public purpose of retaining for the sovereign the exclusive right to purchase Indian lands in order to eliminate potentially hostile competitors. For this reason, this Court on several occasions has described the prohibition as deriving not from an inability of the Indians to sell, but from the inability of the non-Indian to purchase without federal approval. See, *e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832); *Holden* v. *Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). The United States accordingly would not be barred by the passage of time from bringing an action to have the unauthorized sale set aside to protect Indian interests or the public interest more generally (*FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 119; *Nevada* v. *United States*, slip op. 30-31); and

Oneidas and non-Indians in central New York in 1795, the non-Indians occupying the land now vastly outnumber the Oneidas claiming it, many of whom have long since left New York, and the Oneidas themselves could not meaningfully occupy the entire 100,000-acre tract and the thousands of homes, businesses and other improvements that have been made on it.

In light of the foregoing factors, a court in a future case might determine whether or in what manner the analysis of *Felix* should apply to the alienation of tribal land by the Oneida Nation in 1795[36]—at least insofar as

where it owned the underlying fee, the United States could grant a patent to a second non-Indian, whose title would take priority over that of the person who had purchased directly from the Indians (see, *e.g.*, *Johnson* v. *M'Intosh*, *supra*). But vindication of this distinct *sovereign* interest does not require that the Indians' own right to sue to recover possession of the property must continue for an equivalent period.

In this case, however, it may be relevant that the lands at issue were protected by treaty. Article II of the Treaty of Canandaigua provides that the Six Nations' reservations "shall remain theirs, until they choose to sell them to the people of the United States, who have a right to purchase." 7 Stat. 45. This language might be read only to state the principles governing aboriginal occupancy that would have applied even in the absence of the Treaty, rather than to confer any additional property interest on the Indians (cf. *Montana* v. *United States*, 450 U.S. 544, 553 (1981)), especially since the State owned the underlying fee. In *Williams* v. *City of Chicago*, 242 U.S. 434, 437-438 (1917), this Court found that an Indian tribe had abandoned land that was protected by a similar federal treaty. Yet, it is also plausible to view the Oneidas' title to the lands as sufficiently "recognized" or "confirmed" by the United States that it would be unaffected by the Indians' withdrawal from actual occupancy or by their failure to reassert a claim to the land after selling it.

[36] Cf. *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351, 357 (1926); *New York Indians* v. *United States*, 30 Ct. Cl. at 452. However, because the Trade and Intercourse Acts explicitly render any unauthorized sale invalid, the equitable defense of bona fide purchaser, which is not routinely available in a suit brought by the United States on behalf of Indians in the absence of a statute so providing (*Northern Pacific Ry.* v. *United States*, 227 U.S. 355 (1913)), presumably would not be automatically available in a suit brought by a tribe either.

the Tribes might bring an action against current owners of the land in the 100,000-acre area other than the State, as the original wrongdoer, and perhaps the Counties, as political subdivisions of the State that arguably should be associated with the State for purposes of applying equitable defenses. Even if a court were to conclude, however, that a weighing of the equities indicated that recovery of some or all of the land should be denied in a suit by the Tribes, other alternatives might yet remain. A court could consider whether it would be appropriate to award a money judgment based on all or a portion of the value of the Tribes' extinguishable possessory interest in the land (cf. *Green* v. *Biddle*, 21 U.S. (8 Wheat.) at 77) or a money judgment in some other amount if it appeared that the State had paid the Tribes inadequate consideration for the land or realized a profit from its subsequent disposition to settlers (cf. *Felix* v. *Patrick*, 145 U.S. at 334). It might also be possible for a court to withhold an order of ejectment conditioned upon payment of a nominal ground rent reflecting a subsisting tribal possessory interest in the land that has not yet been extinguished by Congress (cf. *United States* v. *Forness*, 125 F.2d 928, 941-942 (2d Cir.), cert. denied, 316 U.S. 694 (1942)).

CONCLUSION

Because the questions we have discussed in Point II have not been presented by petitioners, and because the court of appeals correctly disposed of the issues discussed in Point I, the judgment of the court of appeals should be affirmed insofar as it affirms the district court's finding of liability on the part of the Counties.

Respectfully submitted.

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JULY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10013